No. 91-692

In The

Supreme Court of the United States

October Term, 1991

TONYA RHODES, Personal Representative of the Estate of JAMES EDWARD WEST, Deceased,

Petitioner,

v.

CRAIG McDANNEL, H. CAL ROSEMA, in his official capacity as Van Buren County Sheriff, VAN BUREN COUNTY SHERIFF'S DEPARTMENT and VAN BUREN COUNTY,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER THE TRIAL COURT PROPERLY CONCLUDED THAT ADDITIONAL DISCOVERY WAS UNNECESSARY BECAUSE THE PLAINTIFF COULD NOT SUGGEST AN OUTCOME-DETERMINATIVE FACT THAT WOULD HAVE BEEN REVEALED THROUGH ADDITIONAL DISCOVERY, AND SUFFICIENT OPPORTUNITY FOR DISCOVERY HAD OCCURRED?

II.

WHETHER THE DEPUTIES' ENTRANCE WITH IMPLICIT CONSENT AND UNDER EXIGENT CIRCUMSTANCES INTO THE HOME WAS PERMISSIBLE WHERE THEY WERE ESCORTED IN BY THE COMPLAINANT, WHO HAD INDICATED SHE WAS BEING CHASED BY A MACHETE-WIELDING ASSAILANT?

III.

WHETHER THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS ON THE ISSUE OF EXCESSIVE FORCE WHERE REASONABLE MINDS COULD ONLY CONCLUDE THAT THE DEPUTIES WERE ACTING TO PROTECT A CITIZEN AND IN SELF DEFENSE WHEN CONFRONTED BY THE PLAINTIFF'S DECEDENT, WHO WAS ATTACKING WITH A 23-24 INCH MACHETE WHILE IGNORING ANY REQUEST TO HALT?

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Respondents, CRAIG McDANNEL, CAL ROSEMA, VAN BUREN COUNTY SHERIFF'S DEPARTMENT, and VAN BUREN COUNTY, request that this Honorable Court deny Petitioner's, TONYA RHODES', Personal Representative of the Estate of JAMES EDWARD WEST, Request for Writ of Certiorari to review the Order of the 6th Circuit Court of Appeals dated June 10, 1991. The Petition was docketed at the United States Supreme Court on October 28, 1991.

ORDERS AND OPINIONS BELOW

Respondents rely on the Order and Opinions submitted in the Petitioner's Petition for Writ of Certiorari and its Appendices.

JURISDICTION

This case involves allegations of federal civil rights violations brought pursuant to 42 U.S.C. 1983 asserting a

violation of the 4th Amendment as a result of a fatal shooting that occurred when the individual Deputies fatally wounded the Plaintiff's Decedent as a result of the Plaintiff's Decedent's unyielding confrontation and attack with a 23-24 inch machete upon the deputies and a female citizen.

COUNTER-STATEMENT OF THE CASE

The Plaintiff/Petitioner has clearly misconstrued the facts in her favor and for that reason, Defendants/Respondents request this Court's patience in permitting the Respondents the opportunity to set forth those facts that were discovered and known to the trial court at the time he granted summary judgment.

On March 7, 1989, Deputy Craig McDannel and Deputy Shaw were summoned to the home at 311 East Street in Hartford, Michigan by Shari Heffington. Ms. Heffington returned home after a day of visiting and drinking to find the Plaintiff's Decedent angry. He began assaulting her with a 23-24 inch machete. Ms. Heffington perceived Mr. West to be acting crazy, perhaps because of his jealousy or perhaps because of his excessive drinking that day. Ms. Heffington indicated that he had previously assaulted her at the home on several occasions. On one other occasion, a Hartford police officer was summoned after Mr. West had assaulted Ms. Heffington. Ms. Heffington had to save herself by hitting Mr. West in the head with a beer bottle.

On this particular night, Ms. Heffington escorted the Deputies into the house because she was scared, she could not reason with Mr. West, and he was threatening her with a knife. Shortly after the Deputies were escorted into the living room, Mr. West entered the room and continued to advance with a raised machete

toward Ms. Heffington and the two Deputies. The Deputies told him to stop at least three times. When Mr. West failed to heed the Deputies' warnings and continued to advance on them with the machete, Deputy McDannel shot. Mr. West died as a result of the gunshot wound. Ms. Heffington said that Mr. West had walked within 5 feet of them raising the machete as if to swing it when the Deputies shot.

Mr. West was not employed because of disabling arthritis. Ms. Heffington understands that he was taking prescriptions for the arthritis. These prescriptions were not supposed to be mixed with alcohol. When he did mix the prescriptions with alcohol he became mad, crazy, unreasonable. "He ain't got his right mind." Yet, she cannot stay away from him and every time she leaves him, she goes right back to him.

Deposition of Defendant Deputy Craig McDannel

The statement given by Ms. Heffington is substantially similar to the facts testified to by the Defendant Deputy at his deposition. Deputy McDannel testified that Ms. Shari Heffington met them at the doorway. In fact, Ms. Heffington led the Deputies into the house. She informed the Deputies that the man with the knife was still in the house and motioned for the Deputies to come into the home.

Deputy McDannel testified that he did not have time to investigate nor even consider arrest because of the short amount of time that passed between the time they entered and the appearance of Mr. West. The Deputies entered the house because the Complainant invited them in. Ms. Heffington informed the Deputies again that she was being pursued by a man with a knife. The Deputies saw Mr. West come into the living room holding the knife so the lower portion of his arm

was parallel with the floor, or approximately parallel with the floor. The machete was parallel with the floor, but the tip was pointing toward the back. When asked why the Deputies did not retreat, Deputy McDannel responded that he did not have time. Deputy McDannel testified that they did not have any time to do anything else. Mr. West was standing within 4 to 6 feet from Deputy McDannel at the time he shot.

Although Deputy Shaw also drew his weapon, he did not shoot and held the gun at his side. He also stated that the Deputies repeatedly told West to "stop." Deputy McDannel did not shoot until Mr. West continued to come forward with the raised machete.

Answer: "When he began to raise the machete, I raised my arm, my revolver, took aim, and told him to drop it again another time after I had aimed. And when he didn't, that's when I fired.

Question: He never said a word?

Answer: No.

Question: And Shari Heffington, until he gets shot, isn't saying anything or is she?

Answer: She is.

Question: What does she say?

Answer: She is telling him to 'drop it, James.'"

Plaintiff's Decedent was obviously committing a crime in the presence of the Deputies, felonious assault. At no time did Mr. West stop the process of raising his machete as he approached the group until the time the Deputy fired the gun. It did not appear to the Deputy that he was going to stop advancing or release the machete. Deadly force was required for the purpose of protecting the Deputies and Ms. Heffington.

Deputy McDannel testified that he was a certified Deputy who had attended the Michigan Law Enforcement Officer's Training Council Basic Recruit School in 1974. It was sponsored by the State of Michigan. He attended Basic Narcotic School in April, 1975. He attended the Michigan Law Enforcement Officer's Training Council Advance Police Academy. He attended a seminar on interrogations, admissions and confessions. He attended a training for supervisory development.

Deputy McDannel had received a commendation by the Department and by the Optimist Club for work in instituting a program to utilize tracking and narcotics dogs. Deputy McDannel had never been reprimanded. The only other time Deputy McDannel discharged his weapon in the line of duty was to kill a deer that had been hit by a car, but had not died. Contrary to the Plaintiff's Statement of Facts, an investigation by the Michigan State Police Department did occur in regard to this incident.

The Deposition Testimony of Herbert C. Rosema, Sheriff

Sheriff Rosema brought the General Operating Policy and Procedural Manual of the Department to his deposition. The Sheriff's Department does have a procedure for conducting internal investigations. If a Deputy shoots at someone, the manual requires notification from the State Police. The Michigan State Police assist in investigating the Complaint. The manual requires that the Deputies involved make a report which goes into a file. The Sheriff reviews the reports, contacts the prosecutors, and makes a determination in regard to the incident. Although the State Police do the investigation, the report is turned over to the Sheriff or Under-sheriff to determine whether they will take the disciplinary action. Exhibit 17 outlined the written internal investigation procedures. Although Sheriff Rosema did go to the

house on the evening after the shooting, he did not leave his vehicle. He had taught his Deputies that when they are not involved in the investigation, they should not go into the scene or they could contaminate evidence.

With regard to this incident, the prosecutor did conduct an investigation to determine whether or not Deputy McDannel should be charged. The only other incident that he could recall that involved a shooting occurred in 1982-83 where the State Police officers asked for assistance in handing a hostage situation.

The Department is currently experimenting with a procedure of self-evaluation. In that procedure, the individual Deputy would be evaluated and then he would have the opportunity to respond to his evaluation.

Moreover, Sheriff Rosema testified that if, upon investigation, he had concluded that the Deputy had done something wrong to violate a policy, then Deputy McDannel would have been disciplined as a result of the incident. He made the determination of whether discipline was deserving after he returned from his vacation, which lasted approximately 2½ weeks. He concluded that no disciplinary action was warranted after sitting down discussing the matter with the Undersheriff and later, the prosecutor. The Sheriff also reviewed a number of documents. The Sheriff concluded that Deputy McDannel used good judgment.

Plaintiff's counsel was provided with a Complaint number and file class, 180-1212-89. The file contained a standard crime report, UD 104. It included reports made by Mr. Svilpe, Mr. Craft and Sandra Hagg, the dispatcher. It also included a report from Deputy Lux, a report from Lawrence Police Department by Kirk Goodrich, a Michigan Municipal Authority Incident Report, a L.E.I.N.

report on James West, and a booking card on Mr. West. It contained handwritten notes by Deputy McDannel. It contained a Department of State Forensic Division Report. There was a Department of State Laboratory Report from James Bullock. The Standard Crime Report was signed by John Gillespie. It also included a Hartford Police Investigation Report signed by Mr. Gress. The Hartford Department Investigation Report contained the transcript of Shari Heffington. An envelope contained a report on the autopsy by Dr. Glaser. The report from the Michigan State Police was written by Mr. Wallace, which includes the transcripts of his meetings with Mr. Lux, Mr. Craft, and Sari Heffington. The policy manual contained a policy with regard to the use of deadly force. As new employees arrived, they are provided with a copy of the policy book. The new employees review the policy manual with their sergeant. If they have any questions, they contact the Undersheriff or the Sheriff. In addition to the local policies, the mandatory guidelines of the Michigan Law Enforcement Officer's Training Counsels' Rules and Regulations apply to the Deputy. The Officers or Deputies learn about those policies, practices and procedures of that agency through their school certifications program.

SUMMARY OF THE ARGUMENT

The trial court properly granted summary judgment to the Defendants in the instant case. Additional discovery would not have uncovered any outcome-determinative fact. Plaintiff had adequate time for discovery and presentation of the evidence discovered to the experts prior to the Motion for Summary Judgment. Therefore, dismissal of the matter was not premature.

The trial court properly granted summary judgment on the substantive matters where the Sheriff's Depart-

ment received an excited, hysterical phone call indicating that a citizen was involved in a life-threatening situation. Upon arrival at the home, the Deputies were escorted into the house by a woman who indicated that her life was being threatened by a resident with a 23-24 inch machete. In the next few moments, the Plaintiff's Decedent entered the room raising the machete and advanced upon this individual and the two Deputies. Notwithstanding the continued request to stop, drop the machete, and please to not advance any further, the assailant continued forward. One of the Deputies shot. One of the Deputy's bullets fatally wounded Plaintiff's Decedent. Respondents asserted, and the trial court properly agreed, that the constitutional rights of the Plaintiff's Decedent were not violated under the facts of the instant case.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT PROPERLY CONCLUDED THAT ADDITIONAL DISCOVERY WAS UNNECESSARY BECAUSE THE PLAINTIFF COULD NOT SUGGEST AN OUTCOME-DETERMINATIVE FACT THAT WOULD HAVE BEEN REVEALED THROUGH ADDITIONAL DISCOVERY, AND SUFFICIENT OPPORTUNITY FOR DISCOVERY HAD OCCURRED.

Fed. R. Civ. P. 56 permits the remedy of summary judgment where there is no genuine issue of material fact. Without a material fact in controversy, the movant is entitled to judgment as a matter of law. *Anderson* v. *Creighton*, 483 U.S. 635; 107 S. Ct. 3034, 3042; 97 L. Ed. 2d 523 (1987). Rule 56 "is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules . . . designed to secure the just, speedy and economical determination of every

action." *Celotex Corp.* v. *Catrett*, 477 U.S. 317 at 327; 106 S. Ct. 2548; 91 L. Ed. 2d 265 (1986). There, the Court noted:

> "In our view, the plain language of Rule 56(C) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be 'no genuine issue of material fact,' since a complete failure of proof concerning an essential element of the moving party's case necessarily renders all other facts immaterial. The moving party is 'entitled to summary of judgment as a matter of law' because the non-moving party has failed to make a sufficient showing on an essential element of her case with respect to which she has a burden of proof." *Celotex Corp*., *supra*, 477 U.S. at 322-323 (1986).

In the instant case, a review of the Statement of Facts as set forth by the Defendants clearly provides that discovery in this matter did occur. The incident occurred on March 7, 1989. The Complaint was filed on August 14, 1989. The summary judgment hearing was heard on November 21, 1989, and the Judge filed his Opinion dismissing the claim on December 13, 1989.

A review of the docket entry sheet and the Defendants/Respondents' Statement of Facts illustrates that a number of depositions were in fact taken in this matter. Plaintiff filed the deposition of Defendant Sheriff Cal Rosema. Plaintiff also filed the deposition of Defendant McDannel and Deputy Shaw, the Deputies involved in the incident. In addition, the Plaintiff has taken the

deposition of other deputies that arrived on the scene, Deputy Craft and Deputy Lux.

A statement by the eyewitness, Ms. Heffington, is very similar to the rendition of the pertinent facts described by the Deputies. Contrary to the Plaintiff's assertion, the trial court did not rely on merely self-serving statements of the Deputies. To the contrary, it is the Plaintiff who relies on bare assertions and unsubstantiated conclusions.

The trial court, in fact, reviewed the evidence presented by the parties, including numerous documents and reports that were filed, in reference to the Defendants' Motion for Summary Judgment. The trial court gave the Plaintiff an opportunity to file a supplemental brief. However, the trial court concluded that the allegations that the Defendant Deputy did not formulate a plan prior to his action did not rise to the level of gross negligence. The court also concluded that as a matter of law the entry into the house where the man was wielding a machete was not "of a magnitude such that it was highly probable that harm would follow." It is not reasonable that a man with a knife would advance on two Deputies with drawn guns. It is undisputed that Plaintiff's Decedent advanced on the Deputies and Ms. Heffington with a 23-24 inch machete raised in the air and that he failed to heed any warnings to stop.

Notwithstanding the Plaintiff's attempt to create a disputed issue of fact, the Plaintiff was unable to provide any support for a genuine material issue of fact that would affect the outcome of this case. At oral argument before the 6th Circuit and in her Brief in Support of her Petition, the Plaintiff asserts that additional expert testimony would have revealed that the Plaintiff's Decedent was not 4-6 feet away from the Deputies and Ms. Heffington, but that the Plaintiff's Decedent was 8-9 feet away

from the Deputies and Ms. Heffington. However, the difference of a few feet does not alter the outcome of this case where the assailant is advancing on Ms. Heffington and the Deputies, ignoring their requests to stop, extending a 23-24 inch machete in an attack position. Therefore, the Petitioner's assertion that sufficient opportunity for discovery did not occur is completely without merit. Petitioner has failed to support any facts that would contradict the outcome-determinative facts in this case.

As noted by the 6th Circuit Court of Appeals' Opinion:

> "The District Court has broad discretion in regulating discovery, and its ruling will not be overturned unless there is a clear abuse of discretion. *Misco, Inc.* v. *United States Steel Corp.*, 784 F.2d 198 (6th Cir. 1986); see also *Little* v. *City of Seattle*, 863 F.2d 681 (9th Cir. 1988)." (Opinion, pg. 3).

The trial court did not abuse this discretion in not permitting Plaintiff's counsel additional time. The trial court judge did give Plaintiff's counsel an opportunity to file a Supplemental Brief. Plaintiff was unable to produce any factual support for his position or present sufficient justification to extend discovery. Based upon the materials and arguments the Plaintiff presented, the trial court properly concluded that further discovery was not warranted.

II.

THE DEPUTIES' ENTRANCE WITH IMPLICIT CONSENT AND UNDER EXIGENT CIRCUMSTANCES INTO THE HOME WAS PERMISSIBLE WHERE THEY WERE ESCORTED IN BY THE COMPLAINANT, WHO HAD INDICATED SHE WAS BEING CHASED BY A MACHETE-WIELDING ASSAILANT.

A. Van Buren County Sheriff's Department Is Not A Separate Entity Subject To Liability.

It is well established that the Sheriff's Department is not a legal entity which may be sued in its own name. *Mooney* v. *City of Holland*, 490 F. Supp. 188 (W.D. Mich. 1980); *Davis* v. *Chrysler Corp.*, 151 Mich. App. 463; 391 N.W.2d 376 (1986), citing *McPherson* v. *Fitzpatrick*, 63 Mich. App. 461, 464; 234 N.W.2d 566 (1975). Therefore, the claims against the Van Buren Sheriff's Department must fail and the Sheriff's Department is not a proper party to this lawsuit under any theory of recovery. *Portice* v. *Otsego Co.*, 169 Mich. App. 563; 426 N.W.2d 706 (1988); *lv. den.* 431 Mich. 895 (1988).

B. The Deputies' Entrance Into The Home Is Permissible Where They Were Escorted In By The Complainant Who Indicated She was Being Chased By A Machete-Wielding Assailant.

Defendants agree with the trial court's conclusion that the entry into the home was proper. Defendants assert that a warrantless search for purposes of exploratory investigation and the furtherance of a prosecution of a criminal action is not at issue in the instant case.[1] In the instant case, the Deputies were not on the premises to effectuate an arrest, but were summoned on an emergency basis to aid an individual in a life-threatening situation.

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[1] For purposes of analysis, it should be noted that the instant case is a civil matter pursuant to 42 U.S.C. 1983 and a request for damages. To the contrary, this matter does not involve criminal proceedings and the determination of whether the proffered evidence would be excluded from the criminal proceedings as a result of the violation of the search and seizure rule. Improperly procured evidence for purposes of criminal matters is carefully scrutinized, but the proposition that the allegedly illegally-obtained evidence is excluded does not automatically provide the Plaintiff with the corresponding right to damages on that matter. *Bowens* v. *Kanzze*, 237 F. Supp. 826 (E.D. Ill. 1965); *aff'd.* 318 F.2d 828 (7th Cir. 1965).

The courts have held that police, in the exercise of their duties as police officers, have a right to enter and investigate in an emergency without an accompanying intent to either search or arrest. *Barone* v. *United States*, 330 F.2d 543 (3rd Cir. N.Y. 1964); *cert. den.* 84 S. Ct. 1940; 377 U.S. 1004; 12 L. Ed. 2d 1053 (1964). Officers are not required to delay the course of an investigation if failure to do so would gravely endanger their lives or lives of others. *United States* v. *DeBose*, 410 F.2d 1273 (6th Cir. 1969).

> "First, the party asserting his Fourth Amendment right must establish that a search or seizure occurred of his person, house, papers or affects, and that said search was conducted by an agent of the government; stated differently, there must be an invasion of the claimant's reasonable expectation of privacy. *Katz* v. *United States*, 389 U.S. 347, 388 S. Ct. 507; 19 L. Ed. 2d 576 (1967); *United States* v. *Vachaner*, 706 F.2d 1121 (11th Cir. 1983). Second, the claimant must establish that the challenged search and seizure was 'unreasonable,' because all searches and seizures are not prescribed by the Fourth Amendment. *Elkins* v. *United States*, 364 U.S. 206, 222, 80 S. Ct. 1437, 1446; 4 L. Ed. 2d 1669 (1960)."

Both of the aforementioned requirements are separate and distinct, and both must be met before violation of an individual's rights guaranteed by the Fourth Amendment can occur. *Rawlings* v. *Kentucky*, 448 U.S. 98, 112; 100 S. Ct. 2556, 2565; 65 L. Ed. 2d 633 (1980).

In *Ball* v. *State of Georgia*, 733 F.2d 1557 (11th Cir. 1984), the Court concluded that trespass was not a Fourth Amendment constitutional violation. In *Ball*, plaintiff became angry with his daughter and his friends, which resulted in the vandalizing of a

neighbor's bicycle. The parents of the neighbor child called the police, who went to the Ball residence. Officer Putnam remained on the porch, although he was invited into the house by Ball. The officer requested the full name of Mr. Ball, but Mr. Ball indicated he was going to call his lawyer when in fact he found a 6-inch blue steel revolver which he pointed at the officer as he stood behind the door at the top of the stairs. A shooting resulted.

There, the Court assumed for purposes of argument only that a search and seizure had occurred, but concluded that the challenged search was not unreasonable since Ball implicitly consented to the presence of the officer on his property. To determine the reasonableness of a practice, the Court weighed the public interest promoted by the practice versus the personal rights of the individual protected by the Fourth Amendment. *Bell* v. *Wolfish*, 441 U.S. 520, 588; 99 S. Ct. 1861, 1884; 60 L. Ed. 2d 447, 481 (1979). Consideration of the following factors is relevant.

1) The scope of the particular intrusion;

2) The manner in which it is conducted;

3) The justification for initiating it; and

4) The place in which it is conducted. *Bell*, *supra*, 441 U.S. at 559; 99 S. Ct. at 1884.

The Appellate Court properly concluded that Ms. Heffington did have apparent authority to permit entry into the house, relying on *United States* v. *Matlock*, 415 U.S. 164; 94 S. Ct. 98; 39 L. Ed. 2d 242 (1974), to distinguish this case from *Moffett* v. *Wainwright*, 512 F.2d 496 (5th Cir. 1975). The Appellate Court also acknowledged that search of a private residence without a warrant is permissible if it is in response to an emergency. *United States* v. *DNT*, 747 F.2d 263, 267 (4th Cir. 1984). Likewise,

in *Jones* v. *Lewis*, 875 F.2d 1125 (6th Cir. 1989), the Court affirmed the proposition that a liability could not attach if the warrantless entry was precipitated by exigent circumstances, i.e., that the suspect represented an immediate threat to the arresting officer or public.

Recently, this Court acknowledged that officers may search a house after the officers have found the items or persons listed on the warrant in order to insure their safety while making the arrest. The interest of the officers' safety outweighs the intrusion. *Maryland* v. *Buie*, 494 U.S. 325; 108 L. Ed. 2d 276; 110 S. Ct. 1093; 58 U.S.L.W. 4281 (1990).

In *United States* v. *Morgan*, 743 F.2d 1158 (6th Cir. 1984), the Appellate Court recognized the validity of a warrantless entry where there is an urgent need for immediate action, a compelling reason to justify the lack of a warrant and a serious, demonstrable potential for danger.

In *Butler* v. *City of Detroit*, 149 Mich. App. 708; 386 N.W.2d 645 (1986), the police were called to a party at a residence. The live-in girlfriend called the emergency number and requested assistance at the address when the son and the father became involved in a fight. The officers were escorted into the apartment by the girlfriend. Thereafter, the decedent advanced toward the officers holding a knife in a threatening manner. The officers shot and killed Dink Butler. The Court concluded that the officer was entitled to governmental immunity under the state claims, but also concluded that the plaintiff failed to state a 42 U.S.C. 1983 claim under the Eighth or Fourteenth Amendment. The Court recognized in that case that a Fourth Amendment claim was neither pled nor tried, but reversed the 1983 damages against the Defendant. 386 N.W.2d at 651-652.

In the instant case, the police were called to the residence. When they arrived, Ms. Heffington was in the house, opened the door, and escorted the Deputies into the house. Ms. Heffington's statement implied that she and Mr. West have had a relationship for a long period of time which she has been unable to terminate notwithstanding his abuse.

Additionally, the Deputies were not entering the home for purposes of searching out evidence to seize for criminal prosecution. The Deputies were called there to respond to the life-threatening situation and were summoned by a hysterical phone call. Pursuant to M.C.L.A. 764.15a; M.S.A. 28.874(1), "a police officer who has reasonable cause to believe that a violation [citations omitted] . . . has taken place or is taking place and that the person who committed or is committing the violation is a spouse, a former spouse, or a person residing or having resided in the same household as the victim, may arrest the violator without a warrant for that violation, irrespective of whether the violation was committed in the presence of the peace officer."

Moreover, contrary to the Plaintiff's argument, hearsay from named persons who supply detailed information with direct knowledge of the fact is admissible for determining probable cause for a search warrant. *United States* v. *Jensen*, 432 F.2d 861 (6th Cir. 1970). Therefore, these Deputies had a reasonable belief that they had the consent to enter to perform their duty, and their entry was required where exigent circumstances included danger to the lives of others. These facts were known before the Deputies arrived at the scene. The Deputies were informed that a grave offense may be taking place; the suspect was reasonably believed to be armed; the emergency call provided a clear showing of probable cause; and the Deputies had

a strong reason to believe the suspect was in the dwelling. A peaceable entry was permitted at a reasonable time. These considerations support the position that the entry into the home was lawful.

Petitioner, however, asserts that the victim, Shari Heffington, did not have authority to admit an outsider into the dwelling, thereby implying that if they had inquired and she indicated she was just visiting, that the Deputies should turn around and leave the area. Respondents submit that it is that type of reasoning which resulted in the trial court's characterization of the Plaintiff's argument as "absurd." The Deputies had the obligation to maintain peace. Mr. West had no right to use deadly force against Ms. Heffington or the Deputies.

Moreover, Plaintiff continually concludes that the alleged unlawful entry into the home is the cause of the injury. However, assuming for purposes of argument that the entry was unlawful, the injury was not a direct cause of that activity. The injury was a direct cause of Mr. West's continued advancement upon the victim and the Deputies in a threatening manner with a large machete. Plaintiff fails to cite any authority to support the principle that Mr. West had the right to attack or threaten anyone in his house with a machete. No one threatened Mr. West until he advanced and ignored their continued requests to halt.

Moreover, the fact that the third party, Shari Heffington, invited the Deputies into the home entirely supports the defense of consent. It is undisputed that Ms. Heffington asked and escorted the Deputies into the home because she was frightened because she was being chased by a wild, crazed man with a knife. The courts have concluded that a consent to the search of a room was binding on the Defendant where the two

people were co-inhabitants. *United States* v. *Matlock*, 415 U.S. 164, 171; 94 S. Ct. 98; 39 L. Ed. 2d 242 (1974).

Ms. Heffington had apparent authority to permit the Deputies' entry into the house. Where Deputies are called to a home and escorted into a home under such circumstances, the trial court was correct to conclude that the entry was reasonable and, further, that it was unnecessary for the Deputies to ask for titlework or lease papers. In the instant case, the Deputies were not given the opportunity to investigate, but were required to respond immediately to a life-threatening situation.

Plaintiff has been unable to support any allegations or conclusions to the contrary. Plaintiff has not substantiated his position that Ms. Heffington did not have a right to be in that house or had no right to escort the Deputies into the house. Plaintiff failed to establish who, in fact, did have ownership interest, etc. Ms. Heffington escorted the Deputies into the home and Mr. West did not indicate otherwise.

Such evidence is irrelevant to the issue at hand. There was no "search" for purposes of criminal investigation. Plaintiff relies on case law which concludes that evidence obtained under improper circumstances would be inadmissible to support a criminal conviction. If it is later determined that evidence is excludable, such a determination for a criminal proceeding does not automatically give rise to a constitutional violation for civil damages. Plaintiff, even assuming for purposes of argument that a search had occurred, failed to support evidence that would permit the Plaintiff to meet the requisite standard for establishing her claim.

Ms. Heffington contacted the police and invited them into the house. She had apparent authority to be in the house and by her own admission had resided there and

had on other occasions contacted the police from that address because of Mr. West's abuse of her. There, even assuming for purposes of argument a "search" under the Fourth Amendment could have occurred rather than a mere trespass, at best, the Deputies were rightfully in the room by her consent. See also *Tope* v. *Howe*, 179 Mich. App. 91; 445 N.W.2d 452 (1989); *People* v. *Gray*, 150 Mich. App. 446; 387 N.W.2d 887 (1986).

Moreover, the Plaintiff's argument that the individual, Mr. West, had the right to come after the Deputies with deadly force is absurd. There is absolutely no evidence by the testimony of either Ms. Heffington or the Deputies that Mr. West had requested that the Deputies leave, even assuming for purposes of argument that the Deputies had sufficient time to question or leave. The evidence unequivocally established that their guns were not drawn until after Mr. West advanced toward them. Mr. West had no justification for advancing upon these people with a raised machete, even if they were all trespassers.

As acknowledged by the Petitioner in her Brief, exigent circumstances do arise "where officers have a justifiable belief that felony is being committed," *United States* v. *Mark Polus*, 516 F.2d 1290 (1st Cir. 1975); *cert. den.* 423 U.S. 895; 46 L. Ed. 2d 127; 96 S. Ct. 195 (1975). Here, it is undisputed that the Deputies received a call indicating that Ms. Heffington was fearing for her life because she was being pursued by a man with a knife. Moreover, the description of the circumstances was verified when the Deputies arrived, and later, when Mr. West walked into the room with a machete and proceeded to raise the machete as he approached the three individuals, ignoring any warnings to stop his actions. Exigent circumstances exist where there is a real danger to the police or the public. *United States* v. *Bulman*, 667 F.2d 1374, 1383-1384 (11th Cir. 1982).

Under the facts of this case, objective, reasonable minds could not disagree that the Deputies, informed of a dangerous circumstance, acted reasonably under the circumstances. Plaintiff's claims constitute a second-guessing of the Deputies' handling of the situation, asserting alternatives in hindsight which, in essence, amount to an attempted claim for negligence, at best, but fall short of a constitutional violation. *Jones* v. *Sherill*, 827 F.2d 1102, 1106 (6th Cir. 1982); *Nishiyama* v. *Dickson Co., Tenn.*, 814 F.2d 277, 282 (6th Cir. 1987). Therefore, as the trial court correctly concluded, the Plaintiff's assertion that the entry was improper was insufficient to rise to the level of a constitutional violation and was without merit.

C. Alternatively, The Individual Deputies Are Entitled To Qualified Immunity For Any Acts Of Alleged Illegal Search And Seizure.

Police officers, and other executive officials, are granted "qualified immunity." At one time, this immunity required that an officer show a lack of personal malice toward the plaintiff and objectively-reasonable belief that his actions were legal. However, the landmark case of *Harlow* v. *Fitzgerald*, 457 U.S. 800; 102 S. Ct. 2727; 73 L. Ed. 2d 395 (1982), changed the nature of this defense. The sole inquiry is now whether the defendant knew or should have known that he was violating the plaintiff's clearly-established rights.

> ". . . we therefore hold that governmental officials performing discretionary functions generally are shielded from liability for civil damages unless their conduct . . . violates clearly established statutory or constitutional principles of which a reasonable person would have known."

Plaintiff has not and cannot present any evidence that the Defendant acted in bad faith when he shot Plaintiff's

Decedent. This proof is essential to hold a government official or agent liable for damages arising out of a violation of constitutional rights.

Rheaume v. *Texas Department of Public Safety*, 666 F.2d 925 (5th Cir. 1982), states:

> "Once an official has shown that he was acting in his official capacity and within his scope of authority, the burden shifts to the plaintiff to breach the official's immunity by showing that the officer lacked good faith."

In *Rheaume*, the plaintiff was incarcerated for traffic violations. Plaintiff claimed the arrest was false and thus, a violation of his constitutional rights. The Court held that the defending officer was clearly acting within the scope of his authority. Since plaintiff did not present any evidence that defendant lacked good faith, defendant's actions were protected by qualified immunity.

Whether qualified immunity applies is purely a question of law for the District Court. *Dominique* v. *Telb*, 831 F.2d 673, 677 (6th Cir. 1987). In *Vizbaras* v. *Prieber*, 761 F.2d 1013 (4th Cir. 1985); *cert. den.* 474 U.S. 1101; 106 S. Ct. 8803; 88 L. Ed. 2d 918 (1986), the Court held that in deciding whether defendants used reasonable force to subdue an arrestee who died of asphyxiation as a result of "cradle cup," wherein his legs were at 45-degree angles to the floor in shackles, an honest belief that the procedure was necessary was relevant to "qualified immunity."

In *Whitt* v. *Smith*, 832 F.2d 451 (7th Cir. 1987), an officer who did not speak with the victim or witnesses to a shooting incident, but recalled a similar event involving a plaintiff who lived nearby, entered the plaintiff's home, saw him with a shotgun, and wounded him. There, a denial of "qualified immunity" was reversed

and remanded because of the inadequacy of findings by the District Court. The immunity inquiry is separate from the Fourth Amendment issues.

In *Clark* v. *Evans*, 848 F.2d 876 (11th Cir. 1988), a dangerous escaping prisoner was killed after scaling an outer fence. The "information available" to the guard that shot him could lead the guard to believe that another officer was not in the position to subdue the decedent. This principle has been expressed in *Anderson* v. *Creighton*, 483 U.S. 635, *supra*, as being, if the officers' conduct could reasonably have been thought to be consistent with the rights they allegedly violated, they would be entitled to qualified immunity. The Court should not use hindsight judgment as its test to determine what force was necessary. (*Id.*)

In the instant case, the undisputed facts show that Defendant Deputy McDannel feared for his own life and the lives of others. This fear was reasonable under the circumstances where Mr. West continued to advance them, brandishing an upraised machete and ignoring the warnings to stop. The Deputy's use of deadly force was justified. Deputy McDannel's conduct was also consistent with the Van Buren Sheriff's Department policy and regulations providing for the use of deadly force. Compliance with these regulations is further evidence of McDannel's good faith. The undisputed, objective, material facts support the conclusion that Deputy McDannel could only reasonably believe that he was *not* violating Plaintiff's clearly-established rights but, rather, that he was justifiably acting in defense of himself and others.

D. The Sheriff Is Not Responsible For Acts Of His Deputy Under Respondeat Superior Liability.

The common law doctrine of "respondeat superior" holds the employer liable for torts committed by ser-

vants or employees if they occur within the scope of the employee's duties. Historically, municipal and county employers of police were not held liable on this theory for two reasons. First, vicarious liability would invade the realm of sovereign immunity established by the courts. Second, police officers were not even regarded as employees of the entity which paid them because they were sworn to uphold the law and were agents of the law itself.

Indeed, since respondeat superior liability, even if applicable, only held an employer liable, superior officers were not responsible for the acts of subordinate personnel since they were fellow officers and not employers of their subordinates. *Wilkins* v. *Whitaker*, 714 F.2d 4 (4th Cir. 1983); *cert. den.* 468 U.S. 1217; 104 S. Ct. 3586; 82 L. Ed. 2d 884 (1984). There, a police chief was not liable for a detective's allegedly wrongful search in taking a plaintiff's property. In *Kelly* v. *Ogilivie*, 35 Ill. 2d 297; 220 N.E.2d 174 (1966), the respondeat superior theory was not available to plaintiff in an action against a jail warden and sheriff for the torts of subordinates. In *Isereau* v. *Stone*, 3 A.2d 243; 160 N.Y.S.2d 336; 3 A.2d 243 (1947), the sheriff was not liable for the torts of a sheriff's deputy. "The fact that [the sheriff] may have acted through his deputies does not change the situation, for of necessity he must act through them in most instances, for he and they are considered one in the same officer."

In Michigan, no sheriff is responsible for the acts of misconduct in office of any deputy sheriff. M.C.L. 51.70; M.S.A. 5.863 specifically states:

> "Each sheriff may appoint 1 or more deputy sheriffs at his pleasure, and may revoke such appointments at any time; and persons may also be deputed by any sheriff, by an instrument in

> writing, to do particular acts, who shall be known as special deputies and each sheriff may revoke such appointments at any time. No sheriff shall be responsible for the acts, defaults and misconduct in office of any deputy sheriff . . ."

See also *Portice*, *supra* at 708, citing *Bayer* v. *Macomb Co. Sheriff*, 29 Mich. App. 171, 174; 185 N.W.2d 40 (1970). Under the authorities stated above, it is clear that the trial court properly granted summary judgment to the Sheriff and the Sheriff's Department in this case. *Portice*, *supra*.

Moreover, a claim for supervisory liability under 42 U.S.C. 1983 does not lie where that individual did not actively participate in the incident and there is no connection between the alleged violation and the individual Defendant. *Jones* v. *Lewis*, *supra*; see also *Spear* v. *Lee*, 728 F. Supp. 1408 (E. D. Mich. 1989).

Therefore, the trial court properly granted summary judgment of these issues.[2]

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[2] Although it is unclear as to which specific Defendants the Petition includes, it is abundantly clear that the claims of inadequate training as to either the entity or the Sheriff have been abandoned. Notwithstanding, there is no policy of inadequate training in the instant case as clearly established by Sheriff Cal Rosema's deposition testimony. *Monell* v. *Department of Social Services*, 436 U.S. 658; 98 S. Ct. 2018; 56 L. Ed. 2d 611 (1978). Secondly, as to the individual, Sheriff Cal Rosema, the decision in *Hayes* v. *Jefferson County, Kentucky*, 668 F.2d 869 (6th Cir. 1982); *reh. den.* 673 F.2d 152 (6th Cir. 1982); *cert. den.* 459 U.S. 833; 103 S. Ct. 75; 74 L. Ed. 2d 73 (1982) is controlling. It held that a supervisory official of a municipality cannot be liable for failure to train unless there is a complete failure to train such that future police misconduct is almost inevitable or substantially certain to result in a constitutional violation. Clearly, Officer Rosema established in the instant case that the Deputies were trained. Therefore, assuming for purposes of argument only that the Plaintiff has not in fact abandoned these claims, Defendants argue that such claims are totally without merit. See also *Languirand* v. *Hayden*, 717 F.2d 220, 227-228 (C.A. 5, 1983).

III.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO THE DEFENDANTS ON THE ISSUE OF EXCESSIVE FORCE WHERE REASONABLE MINDS COULD ONLY CONCLUDE THAT THE DEPUTIES WERE ACTING TO PROTECT A CITIZEN AND IN SELF DEFENSE WHEN CONFRONTED BY THE PLAINTIFF'S DECEDENT, WHO WAS ATTACKING WITH A 23-24 INCH MACHETE WHILE IGNORING ANY REQUEST TO HALT.

Defendants incorporate by reference those arguments in the preceding argument relating to the availability of qualified immunity for the individuals, the lack of a policy as to the municipal liability, *Monell, supra*, the lack of respondeat superior liability of the Sheriff, and the lack of an independent status for purposes of bringing an action against the Sheriff's Department, into this argument. Those same arguments apply in the instant case, but to avoid redundancy Defendants rely upon adoption of those same arguments and authorities herein. The trial court properly concluded that the Deputies' actions in the instant case were reasonable as a matter of law. Plaintiff could not provide any support for any substantive evidence that would affect the outcome of this case in regards to those actions taken by the Deputy in response to an unyielding assailant attacking with a 23-24 inch machete.

The United States Supreme Court has set forth the standard for the use of deadly force in the case of *Tennessee v. Garner*, 471 U.S. 1; 105 S. Ct. 1694; 84 L. Ed. 2d 1 (1985). Deadly force can be used only "where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others." The Court amplified on the rule in the following terms:

> "If the suspect threatens the officers with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Tennessee* v. *Garner*, 105 S. Ct. at 1701.

It has been alleged that Defendant Deputy McDannel used excessive and deadly force in violation of the Fourth Amendment's prohibition against unreasonable seizure of the person. The validity of the claim must then be judged by reference to the specific constitutional standard which governs that right, rather than to some generalized "excessive force" standard. See *Tennessee* v. *Garner*, *supra*; *Graham* v. *Connor*, 490 U.S. 386; 109 S. Ct. 1865; 104 L. Ed. 2d 443 (1989).

> "Because 'the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,' *Bell* v. *Wolfish*, 441 U.S. 520, 559 (1979), however, its proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest by flight."
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> * * *
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> "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with a 20-20 vision of hindsight." (citation omitted).
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> * * *
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> "As in other Fourth Amendment contexts, however, the 'reasonableness' inquiry in an excessive

> force case is an objective one: the question is whether the officer's actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. See *Scott* v. *United States*, 436 U.S. 128, 137-139 (1978), see also *Terry* v. *Ohio*, 392 U.S. 1, 21." *Graham* v. *Connor*, *supra*, 57 Law Week 4513, 4516 (1989).

In a case quite similar to the instant case, the United States District Court in Maryland held that the officer's use of deadly force to protect himself was entirely justified. *Estate of Belew* v. *Ruppert, Jr.*, 694 F. Supp. 1214 (D.C. Md. 1988). In that case, after attempting to arouse the decedent from a drunken stupor in a parking lot, the decedent struggled with the deputy and disarmed him of his night stick. Once he had the night stick, decedent raised it over his head and relentlessly advanced on the deputy with the stick upraised in the threatening position, ignoring the deputy's repeated orders to "STOP." The deputy expressly warned the decedent several times that if he did not stop, he would be shot. Nonetheless, the decedent continued advancing on the deputy until the deputy shot and killed him. The Court noted that these facts were undisputed in the depositions, determined that the deputy's use of deadly force to protect himself was entirely justified, and granted summary judgment to the defendant under Fed. R. Civ. P. 56(C). See also *Butler*, *supra*.

The traditional right to use the same amount of force permissible in self defense to protect third persons is, of course, applicable to police officers, who have the authority (if not the duty) to protect the public at large. *Sandman* v. *Hagan*, 261 Iowa 560; 154 N.W.2d 113 (1967). See also *Personal Injury: Actions, Defenses, Damages*, "Assault and Battery" (Mathew Bender 1976); Prosser

and Keeton, *Torts* (5th Ed. 1984), pp. 129-130; and *Police Civil Liability*, "Duty to Protect" (Mathew Bender 1989); *Pleasant* v. *Zamieski*, 895 F. 2d 272 (6th Cir. 1990); *Newcomb* v. *Troy*, 719 F. Supp. 1408 (E.D. Mich. 1989). (Officer's actions in shooting a burglary suspect were justified because he was perceived as an immediate threat to the public, where the suspect was running toward a store clerk whom he had previously held as a hostage.)

The undisputed, material facts in this case show that while Deputy McDannel was answering the call concerning an assailant with a knife, Plaintiff's Decedent began to approach him and two others holding a 23-24 inch machete in a threatening manner. Although told to stop and drop the weapon numerous times by Deputy McDannel and the others, Plaintiff's Decedent made no response to these requests and continued to advance without a change in facial expression. His eyes were fixed upon Shari Heffington, who stood immediately to the left of Deputy McDannel. In the belief that Plaintiff's Decedent was going to use the machete, Deputy McDannel drew his gun. When Plaintiff's Decedent was no more than five to six feet from the three of them, Deputy McDannel raised his weapon and pointed it at Plaintiff's Decedent. He told him one final time to drop the weapon. The machete continued to ascend and when Plaintiff's Decedent was between four and six feet away, Deputy McDannel fired his revolver, fatally wounding the assailant.

Thus, the undisputed facts show, as a matter of law, that Defendant Deputy McDannel was justified in his use of deadly force against Plaintiff's Decedent, Mr. West. Police assistance was requested because of West's threatening use of the machete. Now at the scene, Mr. West was advancing upon Ms. Heffington and Deputies McDannel and Shaw, with an upraised machete, a

weapon capable of inflicting serious injury or even death. Under all the circumstances, the Deputy reasonably could, and did, fear for his life, and his use of deadly force to protect himself and others was legally justified.

The Petitioner, however, attempts to discredit the Deputies' credibility, attempting to use this alleged discrepancy as a stepping stone to create a genuine material issue of fact. Respondents first assert that Plaintiff is attempting to improperly stack an improper inference based upon an inference.[3] The Criminologist's affidavit provided by the Petitioner *does* not dispute or contradict the fact of a continued attack on the Deputies and Ms. Heffington in complete disregard for their warnings to stop. The facts as set forth in the affidavit do not controvert Ms. Heffington's or the Deputies' statements that the assailant was advancing on the individuals with a raised machete with a 23-24 inch blade in order to inflict immediate, serious bodily harm. (R.41, Opinion of the Court, p. 7).

CONCLUSION

Respondents assert that the trial court properly granted summary judgment in this matter. Respondents respectfully submit that the 6th Circuit Court of Appeals properly affirmed the granting of summary judgment to the Defendants in this matter. Notwithstanding the Petitioner's bare assertions to the contrary, the discovery conducted provided that the individual Deputies' actions were clearly reasonable and within the constitutional parameters outlined by this Court in previous decisions. The unfortunate death of

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[1] *Ford* v. *Nicol*, 261 Mich. 307, 310; 246 N.W. 130 (1933).

Plaintiff's Decedent was the result of the Plaintiff's Decedent's own voluntary and intentional act to attack the two deputies and Ms. Heffington.

RELIEF REQUESTED

Based upon the foregoing, the Respondents, Craig McDannel, Cal Rosema, Van Buren County Sheriff's Department and Van Buren County, respectfully pray that this Court deny the Petitioner's Petition for Writ of Certiorari, or alternatively, if the Court grant the Petition, that this Court enter an order affirming the trial court's Order Granting Summary Judgment and the 6th Circuit Court of Appeals' decision affirming the trial court's Order Granting Summary Judgment.

Respectfully submitted,

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